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SUPREME COURT OF THE UNITED STATES

IN THE MATTER OF the Petition of THE EAST RIVER TOWING CO., INC., for Limitation of its Liability as owner of the steamtug EDWARD, her engines, etc.	October Term 1924 No. 81

BRIEF SUBMITTED AS AMICI CURIÆ IN SUPPORT OF THE PETITION

SECTION 33 OF THE MERCHANT MARINE ACT OF 1920 HAS NOT REPEALED THE STATUTES REGARDING LIMITATION OF LIABILITY OF SHIPOWNERS SO FAR AS CLAIMS OR SUITS BASED ON PERSONAL INJURIES TO OR DEATH OF SEAMEN ARE CONCERNED; AND THE PROSECUTION OF AN ACTION AT LAW BROUGHT UNDER THAT SECTION CAN BE ENJOINED BY THE INJUNCTION IN LIMITATION PROCEEDINGS AS PROVIDED FOR IN ADMIRALTY RULE 51.

I

The real question presented by the certificate is whether Section 33 has impliedly repealed the earlier federal statutes relating to shipowners' liability; for, if there is no repeal, an action at law under that section is

subject to the broad regulatory provisions of Rule 51, and an injunction, if the proceedings are proper, must issue.

Section 33 of the Act (Merchant Marine Act, June 5, 1920), is as follows:

"Section 33: That Section 20 of such Act of March 4th, 1915, be, and is, amended to read as follows:

"Section 20. That any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

The pertinent statutes bearing on the limitation of vessel owners' liability are found in 6 Fed. Stat. Ann. (2nd ed.) 336 (R. S. 4283), and 6 Fed. Stat. Ann. (2nd ed.) 368 (23 Stat. 57). The first statute was the Act of March 3, 1851, and the second, section 18 of the Act of June 26, 1884. They are as follows:

"Section 4283. The liability of the owner of any vessel, for any embezzlement, loss, or destruction, by any person, of any property, goods, or merchandise, shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, lost, damage, or forfeiture, done, occasioned or incurred, without the privity, or knowledge of such owner or owners,

shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

* * * * * *

"Sec. 18. That the individual liability of a ship-owner, shall be limited to the proportion of any or all debts and liabilities that his individual share of the vessel bears to the whole; and the aggregate liabilities of all the owners of a vessel on account of the same shall not exceed the value of such vessels and freight pending: *Provided*, That this provision shall not affect the liability of any owner incurred previous to the passage of this act, nor prevent any claimant from joining all the owners in one action; nor shall the same apply to wages due to persons employed by said ship-owners."

The provisions of Section 18 of the Act of 1884 were extended to all seagoing vessels by the Act of June 19, 1886 (24 Stat. 79, 80).

The basis for the argument that Section 33 impliedly repeals the earlier statutes is the clause "may at his election maintain an action for damages at law, with the right of trial by jury" and it is contended that the inclusion of this clause in the statute affects a sweeping change in the maritime policy of this country. (Opinions of District Judges in this case, 294 Fed. 686; *El Mundo*, 294 Fed. 577, and *Re Charles Nelson Co.*, 294 Fed. 926.)*

There is no doubt that Congress could work such a change if it so desired, and the question is whether it has done so by this statute. That there is no express repeal of the earlier Limited Liability statutes is not questioned. Section 33 is part of the Merchant Marine

* When this brief was going into print, the decision of the Circuit Court of Appeals for the Ninth Circuit reversing *Re Charles Nelson Co.*, 294 Fed. 926, was announced. A copy of the Court's opinion is printed as Appendix VII to the brief of the appellant petitioner.

Act of 1920. Section 2 of that Act repeals certain statutes; no mention is made of the Limited Liability statutes. *But Section 1 declares that the purpose of the Act is to stimulate private ownership by citizens of the United States in a merchant marine and to develop and encourage the maintenance of such a merchant marine.* Moreover, section 33 itself is an amendment of Section 20 of the Act of March 4, 1915, dealing with the rights of seamen in cases of injury and which was before the court in *Chelentis* v. *Luckenbach Steamship Company,* 247 U. S. 372.

The rules governing a repeal by implication are fully stated in *Endlich, Interpretation of Statutes,* § 210, as follows:

"But repeal by implication is not favoured. It is a reasonable presumption that the Legislature did not intend to keep really contradictory enactments in the statute-book, or to effect so important a measure as the repeal of a law without expressing an intention to do so. Such an interpretation, therefore, is not to be adopted unless it be inevitable. Any reasonable construction which offers an escape from it is more likely to be in consonance with the real intention. Hence it is a rule founded in reason as well as in abundant authority, that, in order to give an act not covering the entire ground of an earlier one, nor clearly intended as a substitute for it the effect of repealing it, the implication of an intention to repeal must necessarily flow from the language used, disclosing a repugnancy between its provisions and those of the earlier law, so positive as to be irreconcilable by any fair, strict or liberal, construction of it, which would, without destroying its evident intent and meaning, find for it a reasonable field of operation, preserving, at the same time, the force of the earlier law, and construing both together in harmony with the whole course of legislation upon the subject" (pp. 280, 281).

Unless, therefore, the provisions relating to the limitation of ship owners' liability are utterly inconsistent with and in direct conflict with Section 33, the two acts must remain and effect will be given to each as the occasion requires. Whether or not the two groups of statutes are inconsistent and conflicting will be determined by the respective sphere of influence of these statutes and by their history and purpose.

The purpose of the Limited Liability Acts and the policy that dictated their enactment have often been declared by the court.

Butler v. *Boston Steamship Co.*, 130 U. S. 527, involved the questions whether the Limited Liability Acts applied to personal injuries and death as well as to cases of loss of or injury to property and whether those statutes had not themselves been superseded by the Steamboat Inspection Act of February 28, 1871. The court, in holding that the statutes did apply to injury and death cases, said:

"If we look at the ground of the law of limited responsibility of ship-owners, we shall have no difficulty in reaching the conclusion that it covers the case of injuries to the person as well as that of injuries to goods and merchandise. That ground is, that for the encouragement of ship-building and the employment of ships in commerce, the owners shall not be liable beyond their interest in the ship and freight for the acts of the master or crew done without their privity or knowledge. *It extends to liability for every kind of loss, damage and injury.* This is the language of the maritime law, and it is the language of our statute which virtually adopts that law. The statute declares that 'the liability of the owner of any vessel, for embezzlement, loss or destruction, by any person of any property, goods or merchandise, shipped or put on board of such vessel, or for any loss, damage or injury by collision, or for

any act, matter or thing, [loss], damage or forfeiture, done, occasioned or incurred, without the privity or knowledge of such owner, or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel and her freight then pending.' (Rev. Stat. 4283. The word 'loss' in the statute of 1851 is printed 'lost' in the Revised Statutes, evidently by mistake.) This is the fundamental section of the law. On this section the whole provision turns. And nothing can be more general or broad than its terms. The *'liability* * * * shall in no case exceed', etc. It is the liability not only for loss of goods, but for any injury by collision, or for any act, matter, loss, damage or forfeiture whatever, done or incurred" (pp. 549, 550) (italics ours).

* * * * * *

"Now it is contended that it does not extend to personal injuries as well as to injuries to property. If this position can be maintained the value of the act, as an encouragement to engage in the shipping business, will be very essentially impaired. The carriage of passengers in connection with merchandise is so common on the great highway between the old and new continents at the present day, that a law of limited liability, which should protect ship-owners in regard to injuries to goods and not in regard to injuries to passengers would be of very little service in cases which would call for its application" (p. 550).

* * * * * *

"We have no hesitation in saying that the limitation of liability to the value of the ship and freight is general; and that when the proceeds of the latter are insufficient to pay the entire loss, the object of the fourth section of the old law (the 4284th of the Revised Statutes) is mainly to prescribe a *pro rata* distribution amongst the parties who have sustained loss or damage. We think that the law of limited liability applies to cases of personal injury and death as well as to cases of loss of or injury to property" (p. 552).

* * * * * * *

"The law of limited liability, as we have frequently had occasion to assert, was enacted by Congress as a

part of the maritime law of this country, and therefore it is co-extensive, in its operation, with the whole territorial domain of that law" (p. 555).

With respect to the contention that in cases of personal injury and death the Limited Liability statutes were superseded by the Steamboat Inspection Act, the court said:

"It is contended, however, that the act of February 28, 1871, entitled 'An act to provide for the better security of life on board of vessels propelled in whole or in part by steam, and for other purposes,' 16 Stat. 440, supersedes or displaces the proceeding for limited liability in cases arising under its provisions. We do not see the necessity of drawing any such conclusion. The act itself contains no provision of the kind. It requires certain precautions to be taken by owners of coasting steam-vessels and those engaged in navigating them to avoid as far as possible danger to the lives of passengers. Amongst other things, by the 51st section of the act (Rev. Stat. § 4401), it is provided that all coast-wise seagoing steam vessels 'shall, when under way, except on the high seas, be under the control and direction of pilots licensed by the inspectors of steamboats.' By the 43d section (Rev. Stat. § 4493) it is declared that whenever damage is sustained by a passenger or his baggage, the master and owner, or either of them, and the vessel, shall be liable to the full amount of damage if it happens through any neglect or failure to comply with the provisions of the act, or through known defects, etc. This is only declaring in the particular case, what is true in all, that if the injury or loss occurs through the fault of the owner, he will be personally liable, and cannot have the benefit of limited liability. But it does not alter the course of proceeding if the claim of limited liability is set up by the owner (p. 553).

In *The Scotland*, 105 U. S. 24, the court, in holding that the owner of a foreign vessel could obtain the

benefit of the Limited Liability Acts in our courts, said:

"The act of Congress creating a limited responsibility of ship-owners in certain cases, first passed March 3, 1851 and reproduced in sects. 4282-4289 of the Revised Statutes, is general in its terms, extending to all owners of vessels without distinction or discrimination. It declares that 'the liability of the owner of any vessel for any embezzlement, loss, or destruction, by any person, of any property, goods or merchandise, shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall in no case exceed the amount of value of the interest of such owner in such vessel, and her freight then pending.' This statute declares the rule which the law-making power of this country regards as most just to be applied in maritime cases. The great carrying trade by land is governed by substantially the same principle; being in the hands of corporate associations, whose members are not personally liable for acts of the employes, but risk only the amount of their capital stock in the corporation. The doctrine of *respondeat superior*, it is true, applies to the corporations themselves; but that does not interfere with the personal immunity of the shareholders. Whenever the public interest requires the employment of a great aggregation of capital, exposed to immense risk, some limitation of responsibility is necessary in order that men may be induced to contribute to the enterprise. As Grotius says, in reference to this very matter of ship-owners, 'Men would be deterred from owning and operating ships, if they were subject to the fear of an indefinite liability for the acts of the master.' Jure B. & P., lib. 2, c. 11, s. 13.

'*But it is enough to say, that the rule of limited responsibility is now our maritime rule. It is the rule by which, through the act of Congress, we have announced that we propose to administer justice in maritime cases.* We see no reason, in the absence of any different law governing the case, why it should not be applied to foreign ships as well as to our own, whenever

the parties choose to resort to our courts for redress. Of course the rule must be applied, if applied at all, as well when it operates against foreign ships as when it operates in their favor" (pp. 30, 31) (italics ours.)

The principle that the law of limited responsibility "extends to liability for every kind of loss, damage and injury" (*Butler* v. *Boston Steamship Co., supra*) was further emphasized in *Richardson* v. *Harmon*, 222 U. S. 96. In construing the act of 1884 and extending it to a non-maritime tort, damage to a bridge by a vessel, the court said:

"In view of the manifest policy of Congress to further encourage the ship-owning industry and the very broad terms employed in this last legislation, we can but infer that the policy of the Government was to confine the risk of an owner not personally at fault to his interest in the ship. To say that Congress meant no more by extending the limitation to any and all debts and liabilities than to include obligations arising *ex contractu* would be to utterly ignore the fact that such a construction would leave an owner subject to a large class of obligations arising from non-maritime torts, and leave nothing to which the words, 'any and all * * * liabilities' could apply" (p. 104).

Moreover the statutes were not intended to be set up in hostility to other statutes, state or federal, which might create new rights or liabilities. They created no new rights, in the sense of new claims to be enforced at the behest of the person asking relief for a wrong done him; and they operate on the rights of others, whether those rights are based on statute or not, only to the extent of requiring that the amount recovered, which might otherwise be unlimited, be limited by a measure fixed by our maritime policy. *The Titanic*, 233 U. S. 718.

There can be no doubt that the purpose of Congress in passing the Limited Liability Acts, was to bring our maritime law with respect to ship-owners' liability into harmony with the law of the Continent, so that American shipping interests would not be at a disadvantage in competition with foreign shipping interests. The statutes were enacted so that American capital might be attracted to shipping without exposing itself to undue risks, and in recognition, so far as single ships were concerned, of the value of the social policy permitting the limitation of risk of an industry when carried on under corporate form. The statutes have remained on the books, unimpaired, over seventy years and should be regarded as the fundamental law of the land in maritime matters,—the law under which "we propose to administer justice in maritime cases" (per Bradley, *J.*, in *The Scotland, supra*). Statutes of such long standing, and so fundamental in their operation should not lightly be set aside, nor should they be regarded as repealed and rendered obsolete by any subsequent legislation short of an actual declared repeal.

The purpose and object of Section 33 can be seen by the state of the law which preceded it. Up to the time of its passage a seaman who was injured could recover "maintenance and cure", and indemnity only in case his injuries resulted from the unseaworthiness of the vessel. That was the measure of his rights and the extent of the ship-owners' liability whether suit was brought at law, in a state court or federal court, or in admiralty. If the action was brought at law the seaman could have a trial by jury under the "saving clauses"

of the various Judiciary Acts from the Act of 1789 on (Judiciary Act of 1911, sec. 24, subd. 3 and sec. 256, subd. 3).

Panama Railroad Co. v. *Johnson,* 264 U. S. 375;
Carlisle Packing Co. v. *Sandanger,* 259 U. S. 255;
Chelentis v. *Luckenbach S. S. Co.* (*supra*);
The Osceola, 189 U. S. 158.

As a seaman always had his choice of a forum and as he could always "maintain an action for damages at law with a right of trial by jury" this clause in section 33 conferred no additional rights upon him (*Panama Railroad Co.* v. *Johnson, supra*). The section did, of course, create broad substantive rights by conferring upon seamen the benefit of the Federal Employers' Liability Act originally enacted for the benefit of railroad employes. But, until the decisions of the district judges in this case and the other two cited (p. 3, *brief*) it had always been the law that a seaman's right to recover for injuries was subordinate to the ship-owners' right to limit his liability (*Carlisle Packing Co.* v. *Sandanger, supra*). If therefore, it should be held that Section 33 impliedly repeals the Limited Liability Acts because of the provision for a jury trial the court would be giving sweeping effect to a clause which in any event is superfluous.

Indeed a most effective answer to the suggestion that there has been an implied repeal is the fact that when Congress desired to exempt a seaman's claim for wages from the operation of the limited liability statutes it said so in express terms (see the proviso in the statute of 1884, p. 3, *brief*). If Congress cared to free

a seaman who had been injured from the limitation imposed on the amount of recovery by the limitation statutes, it would have been equally astute to do so by express provisions and it cannot be said to have done so by the clause as to a jury trial.

The opinions of the District Judges in the cases below were written before the decision of the court in *Panama Railroad Company* v. *Johnson, supra,* and it is at least questionable whether the judges would have decided as they did, if they had had the benefit of the court's views in that case. For the clause as to a jury trial upon which they based their opinions is no longer to be regarded as an absolute direction as to the court in which suits under the statute are to be litigated and must be construed as codifying ancient principles with regard to the forum of a seaman's action for injuries. A seaman could always "at his election" sue at law or in admiralty and Section 33 merely reaffirms that election; and wherever he sues, his suit is on a maritime cause of action, and always subject to the principles of our maritime jurisprudence. (*Panama Railroad Co.* v. *Johnson, supra,* p. 388.) The section is not like one "where the provision for the liability is coupled with a provision for a special remedy and that remedy, and that alone, must be employed" (*Tennessee Coal Co.* v. *George,* 233 U. S. 354, 359), and it "neither withdraws injuries to seamen from the reach and operation of the maritime law, nor enables the seaman to do so" (*Panama Railroad Co.* v. *Johnson, supra* (p. 388).

Since the section does not change the nature of a seaman's cause of action and since it leaves unchanged the

appropriate forum of litigation, the basis of the District Judges' refusal to enforce the Limited Liability statutes falls. It would not be contended that if a seaman were to bring suit in admiralty under the new rules, his rights under those rules would be absolute and unlimited by the limited liability statutes. Can it be supposed that the intention of Congress was to subordinate the ship-owners' right to limit his liability to the rights of a seaman under this statute if an action were brought at law? If that were true, the very objection to the statute suggested in the *Johnson* case [that it was limited in operation to actions at law and so brought lack of harmony into the maritime law] would still be open to argument. But, to paraphrase the language of the court in that case "such a distinction would be so unreasonable that we are willing to attribute to Congress the purpose to make it" (p. 391). Or, suppose a case where there are claims by passengers, members of crew, cargo-owners and others, and the ship-owner petitions for limitation before suits are started by claimants. There is no doubt that the claim of an injured seaman in the limitation proceedings, like the claims of all others, would be subject to the operation of the limited liability statutes. If a seaman should start an action at law a day before the limitation proceedings were commenced, should not the claim be similarly subject?

If the clause as to a jury trial is disregarded, as we believe it should, it is submitted that no points of conflict remain. The two statutes occupy different positions in the field of legislation and each can be operative within

its own field. The Limited Liability Acts underlie all discussion of our maritime law. They are the foundation of our maritime law and all other statutes of special or limited application are built upon them. As pointed out in *The Titanic* (*supra*), they created no liability but assumed its existence from other sources. "That [the Act of Congress limiting liability] does not impose but only limits the liability—a liability assumed already to exist on other grounds" (p. 733). They in no way conflict with statutes which have as their purpose the creation of new rights or the imposition of liability. So in *Butler* v. *Boston S.S. Co.* (*supra*), where the court was called upon to apply the Massachusetts Death Statute in limitation proceedings, it said:

"We have no hesitation, therefore, in saying that the limited liability act applies to the present case, notwithstanding the disaster happened within the technical limits of a County of Massachusetts, and notwithstanding the liability itself may have arisen from a state law" (p. 558).

Section 33 creates certain additional rights. Apart from the reaffirmation of a seaman's privilege of having his case tried before a jury, if he is in a court of law, he is given the benefit of certain statutes originally passed for the benefit of railroad employes. He is no longer confined to a recovery for "maintenance and cure" and he no longer need prove unseaworthiness in order to establish liability. If, however, as has always been the case heretofore in a seaman's action for injuries, circumstances which bring his case along with other cases into a court of admiralty and into limitation proceedings supervene, his new rights, never absolute, must yield to the older and more general principle of our maritime

law as embodied in the Limited Liability Acts—the principle that assuming the existence of liability the extent of that liability will be measured by the ship-owner's interest in the venture.

The section changes common law notions of *respondeat superior* by making the ship-owner liable to a seaman for the negligence of a fellow-seaman; but it does not change the cause of action nor enlarge the *quantum* of damages. Mr. Justice Bradley in *The Scotland* (*supra*) suggested the analogy between the limited liability of shareholders in a corporation and the limitation of liability of a shipowner in a particular venture (p. 30). It is true, he said, that the doctrine of *respondeat superior* applies to the corporations themselves; but that does not interfere with the personal immunity of the shareholders. Similarly the doctrine of *respondeat superior* has been changed by Section 33, to the extent of making the ship-owner liable in cases where he heretofore has not been liable; but that does not interfere with his personal immunity beyond the extent of his interest in the particular venture.

The uniform practice of courts below, state and federal, in cases that have come before them, where an apparent conflict between the Limited Liability Acts and other statutes or sources of law has presented itself, has been to enforce the Limited Liability statutes as the basis of the extent of liability.

In *The Passaic,* 204 Fed. 266, the Circuit Court of Appeals for the Second Circuit had before it what we consider to be the very question as in this case and it decided that the Limited Liability Acts were paramount and in no way affected or modified by the provisions of the second Federal Employers' Liability Act. An action had been brought against the Erie Railroad

Company under the Federal Employers' Liability Act in the New York Supreme Court to recover damages for the death of plaintiff's intestate, an oiler on a ferry-boat. The Railroad Company filed a petition in admiralty to limit its liability, at the same time denying its negligence. The case was disposed of on its merits favorably to the petitioner in the district court and on appeal the decree was affirmed. It was urged by the claimant that the Federal Employers' Liability Act of 1908 by implication repealed the earlier limited liability statutes so far as the Act of 1908 dealt with employes of railroad companies engaged in interstate commerce on navigable waters. The court held that there was no repeal.

"If the limited liability act and the acts regulating the liability of such railroads to their employes can be construed consistently with each other, so that both shall stand, they must be so construed. What shocks the mind is that whereas full compensation can be had in the case of employes of such a railroad company killed or injured on shore, often only a partial compensation or none at all can be had in the case of employes killed or injured on a vessel of the railroad company. Still this is the very distinction which Congress has made and for many years permitted to stand between liability of defendants generally for the loss or injury to persons or property on shore and liability of vessel owners for the same injuries. *The acts of Congress regulating the liability of railroads to their employes does not affect the cause of action in any way, but abolish certain defenses, such as contributory negligence and assumption of risk. This is entirely consistent with previous legislation limiting the extent of the employer's liability for the cause of action*" (pp. 267-268) (italics ours).

To the same effect is the ruling of the District Court in *Erie R. R. Co.* v. *Hansen,* reversed on other grounds in 260 Fed. 100.

The Federal Employers' Liability Act does not expressly confer a right of trial by jury. Section 3, however, provides that in a case of contributory negligence,

"the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe";

and inasmuch as the statute deals with a subject matter within the jurisdiction of common law courts, the right to a jury under that Act is certainly as broad as the right of trial by jury which it was contended was conferred on seamen by Section 33. The latter act purports to confer on seamen substantially the same rights that railroad employes have under the Federal Employers' Liability Act; and if the holdings of the court in *The Passaic* and *Hansen* cases are sound, we submit that the same procedure should be followed with respect to the present claim.*

A similar question was before the court in *Richardson* v. *Harmon* (*supra*). The case arose out of a collision between a steam barge and a railway drawbridge resulting in damage to both barge and bridge. The owners of the bridge brought an action in the State Court of Ohio to recover their damage. Thereafter the owners of the barge filed a petition for limitation of liability in the District Court of Ohio. The owners of the bridge objected to the jurisdiction of the court on the ground that the damage to the bridge being non-maritime in nature, the right of action to recover therefor was exclusively within the jurisdiction of a court of law, and

* See, too, the opinion of the Circuit Court of Appeals for the Ninth Circuit in *Re Charles Nelson Co.* (Appendix VII, brief of appellant petitioner).

the District Court could not entertain limitation proceedings. The court, after considering the various statutes governing the limitation of a ship-owners' liability, upheld the right to limit, *notwithstanding the fact that a direct action by the bridge-owner had to be at law with a right of trial by jury.*

In *Butler* v. *Boston Steamship Co.* (*supra*), the claimant was proceeding under a death statute of Massachusetts which provided that one causing death by wrongful conduct should

"be liable in damages not exceeding five thousand nor less than five hundred dollars, to be assessed with reference to the degree of culpability".

The interest of the owners in the vessel after the collision did not exceed $1,000. Obviously the Massachusetts statute could not be given full force and effect if the fund from which the claimant could draw was limited to the owner's interest in the vessel. Nevertheless the court held that the Limited Liability Acts applied notwithstanding the liability itself arose from a State law (p. 558).

In re St. Louis & Tennessee River Packet Co., 266 Fed. 919, presented the question of the court's power to enforce the Missouri death statute in limitation proceedings. That statute provides that one responsible for death by wrongful conduct should be liable in the sum of "not less than $2,000 and not exceeding $10,000 in the discretion of the jury". The court granted a petition for limitation of liability and directed that the claims for death be referred to a commissioner for assessment.

The Constitution of the State of New York provides that the amount recoverable for injuries resulting in death "shall not be subject to any statutory limitation" (Art. I, Sec. 18). The Circuit Court of Appeals for the Second Circuit, nevertheless, in *The Transfer No. 12*, 221 Fed. 409, directed that a claim under the New York Death Statute be referred to a commissioner in limitation proceedings for ascertainment of the claimant's pro-rata share in the limitation fund.

The Constitution of the State of Pennsylvania contains a similar provision, but in *Loughin* v. *McCaulley*, 186 Pa. 517, the court held that this provision must yield to the underlying provisions of the Limited Liability Acts.

In *The Hoffmans*, 171 Fed. 455, it was held that the provision in the act of June 29, 1906 (34 Stat. 595) making carriers liable to holders of bills of lading in certain cases for "any loss, damage or injury" to property, did not effect a repeal of the Limited Liability Acts.

If the courts in applying these statutes have been able to harmonize apparent inconsistencies and apparently irreconcilable features, the same result should follow in the application of Section 33. So long as the ship owner does not claim the benefit of the Limited Liability Acts, a seaman, or in a death action, his personal representative, may proceed in accordance with the provisions of that Section and obtain its full benefits, either in an action at law or by suit in admiralty. It is only when a disaster occurs and the ship owner finds that the total amount of the claims to which he may be subjected will exceed the value of his interest in the venture *or* apprehends that he may be

obliged to defend numerous actions in different courts that he will claim the benefit of the Limited Liability Acts. By so doing he in no way seeks to nullify the effect of Section 33; on the contrary, he recognizes the obligation which it creates but asks to have the obligation itself enforced by reference to, and the extent thereof limited by, certain other statutes which are the basis of responsibility in our maritime law. It results, therefore, that there is no conflict between the two statutes; that each can be given full force in its respective sphere, and that there is no repeal.

II.

The answer to question 1 of the certificate is implicit in the answer to question 2. For if there is no repeal, Section 33 takes its place in our maritime law, coordinate with other statutes which may tend to create new rights, but subordinate to the Limited Liability Acts (*Richardson* v. *Harmon, supra*). It has been suggested by two of the judges below, that even if the right to limit may not have been taken away, the right and the method of enforcement have been materially circumscribed, as in this case, by opposing to it an absolute right on the part of a seaman to a jury trial. But if the Limited Liability Acts are not repealed *in toto*, they cannot be repealed in part and a ship-owner's rights under them cannot be cut down by any interpretation of Section 33 which would virtually emasculate those statutes. If there is no repeal, the procedure dictated by the Limited Liability Acts and by the Supreme Court rules promulgated thereunder, must be followed; and it is settled that the jurisdiction of a court of admiralty in limitation proceedings is

exclusive and that the rights of all persons concerned in the subject matter of the proceedings must be finally determined therein.

San Pedro, 223 U. S. 365;
Richardson v. *Harmon*, *supra*;
Butler v. *Boston S. S. Co.*, *supra*;
Providence & New York S. S. Co. v. *Hill Mfg. Co.*, 109 U. S. 578;
The 84-H, 296 Fed. 427 (certiorari denied, 264 U. S. 596).

In *Richardson* v. *Harmon* (*supra*), the court after determining that the case under consideration was one in respect to which a ship-owner could limit his liability said:

"If thus the owner's liability for a tort permitted or incurred through the master or crew although non-maritime because due to a collision between the ship and a structure upon land, be one in respect to which his liability is limited, and he applies for the benefit of such limitation to the proper District Court of the United States 'all proceedings' by the express terms of Par. 4285 Revised Statutes, 'against the owner shall cease'. The procedure in any such case is prescribed by the 54th and 55th rules in Admiralty, where it is said that the court shall 'on application of the said owner or owners, make an order to restrain the further prosecution of all and any suit or suits against said owner or owners in respect of any such claim or claims'. *Providence & N. Y. Steamship Co.* v. *Hill Mfg. Co.*, 109 U. S. 578; *Butler* v. *Steamship Co.*, 130 U. S. 527, 549" (p. 106).

In the *San Pedro* (*supra*) the court said:

"Conceding all that can be said about the expense, delay and inconvenience which will result if the salvage claimants are to be required to present their claim in the

limited Liability case, yet far greater confusion must result if such objections are enough to defeat the manifest object of the fifty-fourth rule. This court in furtherance of the apparent purpose of Congress to limit the liability of vessel owners (Revised Statutes, §§ 4283-5), has, by that rule, prescribed how an owner may avail himself of the benefit of the statute. *The very nature of the proceeding is such that it must be exclusive of any separate suit against an owner on account of the ship. The monition which issues when the vessel has been surrendered and a stipulation entered into to pay the value into court, requires every person to assert his claim in that case*" (p. 371) (italics ours).

In *Providence & New York S. S. Co.* v. *Hill* (*supra*), the court said:

"In promulgating the rules referred to, this court expressed its deliberate judgment as to the proper mode of proceeding on the part of shipowners, for the purpose of having their rights under the act declared and settled by the definitive decree of a competent court, which should be binding on all parties interested, and protect the shipowners from being harassed by litigation in other tribunals" (p. 594).

The court also said:

"We have deemed it proper to examine thus fully the foundation on which the rules adopted in December term, 1871, were based, because, if those rules are valid and binding (as we deem them to be), it is hardly possible to read them in connection with the act of 1851 without perceiving that after proceedings have been commenced in the proper district court in pursuance thereof, the prosecution *pari passu* of distinct suits in different courts, or even in the same court by separate claimants against the shipowners, is, and must necessarily be, utterly repugnant to such proceedings, and subversive of their object and purpose" (p. 594).

We submit, therefore, that if Section 33 has not repealed the Limited Liability Acts and if an action

under that section is one in which the ship-owner is entitled to limit his liability, the procedure common to all limitation proceedings must be followed, and the injunction must issue.

The procedure in the limitation of liability is uniform and coherent. In proceedings to limit liability, a single court determines all questions of liability, of the right to limit, and the validity and extent of the claims. To depart from that procedure, and to permit claimants, at their option, to have their claims passed on by juries in advance of a hearing in admiralty in limitation proceedings, or in disregard of such a hearing, would result in extreme uncertainty in the law, and would defeat Congressional policy with respect to the liability of ship-owners and the method of enforcing that liability.

1. The answer to the first question certified should be, Yes.

2. The answer to the second question certified should be, No.

Respectfully submitted,

CHAUNCEY I. CLARK,
SAMUEL C. COLEMAN,
as *amici curiæ*.

Dated, New York, November 10, 1924.

N1917

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No. 359

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1923

In the Matter of the Petition of THE EAST RIVER TOWING CO., INC., for Limitation of Its Liability as Owner of the Steamtug "Edward", her engines, etc.

On questions certified by the United States Circuit Court of Appeals for the Second Circuit upon the appeal of

THE EAST RIVER TOWING CO., INC.,

Petitioner and Appellant,

vs.

ELIZABETH MCCAFFREY, as administratrix, etc.,

Appellee.

BRIEF OF FRANK P. DEERING, HALSEY L. RIXFORD, AND ROBERT M. JONES, AMICI CURIAE.

STATEMENT.

The questions certified to the Supreme Court by the United States Circuit Court of Appeals for the Second Circuit are as follows:

"1. If an action at law be brought such as is described in the Merchant Marine Act, 1920, Sec. 33, can the prosecution thereof be enjoined by the injunction provided for in Admiralty Rule 51?

"2. Has the Merchant Marine Act, 1920, Sec. 33, impliedly repealed the statute regarding limitation of liability of ship owners so far as claims or suits based on personal injuries or death of seamen are concerned?"

The Edward, 291 Fed. 1017.

The portions of the limited liability statutes material here are the Act of March 3, 1851, C. 43, 9 Stat. 635, as now found in Sections 4283-4285 of the Revised Statutes and Section 18 of the Act of June 26, 1884, C. 121, 23 Stat. 57.

"Sec. 4283. The liability of the owner of any vessel, for any embezzlement, loss, or destruction, by any person, of any property, goods, or merchandise, shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity, or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel and her freight then pending."

"Sec. 4284. Whenever any such embezzlement, loss, or destruction is suffered by several freighters or owners of goods, wares, merchandise, or any property whatever, on the same voyage, and the whole value of the vessel, and her freight for the voyage, is not sufficient to make compensation to each of them, they shall receive compensation from the owner of the vessel in proportion to their respective losses; and for that purpose the freighters and owners of the property, and the owner of the vessel, or any of them, may take the appropriate

proceedings in any court, for the purpose of apportioning the sum for which the owner of the vessel may be liable among the parties entitled thereto."

"Sec. 4285. It shall be deemed a sufficient compliance on the part of such owner with the requirements of this Title relating to his liability for any embezzlement, loss, or destruction of any property, goods, or merchandise, if he shall transfer his interest in such vessel and freight, for the benefit of such claimants, to a trustee, to be appointed by any court of competent jurisdiction, to act as such trustee for the person who may prove to be legally entitled thereto; from and after which transfer all claims and proceedings against the owner shall cease." *Revised Statutes.*

"Sec. 18. That the individual liability of a ship-owner, shall be limited to the proportion of any or all debts and liabilities that his individual share of the vessel bears to the whole; and the aggregate liabilities of all the owners of a vessel on account of the same shall not exceed the value of such vessels and freight pending: Provided, That this provision shall not affect the liability of any owner incurred previous to the passage of this act, nor prevent any claimant from joining all the owners in one action; nor shall the same apply to wages due to persons employed by said ship-owners." *Act of June 26, 1884, C. 121, 23 Stat. 57.*

Section 33 of the Merchant Marine Act of June 5, 1920, C. 250, 41 Stat. 1007, amends Section 20 of the Seamen's Act, entitled "An Act to promote the welfare of American seamen in the merchant marine of the United States; to abolish arrest and imprisonment as a penalty for desertion and to secure the abrogation of treaty provisions in relation thereto; and to promote safety at sea," C. 153, 38 Stat. 1185, and reads:

"Sec. 33. That section 20 of such Act of March 4, 1915, be, and is, amended to read as follows:

"Sec. 20. That any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

The interest of the proctors filing this brief as *amici curiae* arises through the following facts:

In November, 1923, there was at issue and there is now pending, in the Southern Division of the United States District Court for the Northern District of California, an action at law brought under Section 33 of the Merchant Marine Act of 1920, which action is No. 16,769, and is entitled "Thos. S. Curtis, Plaintiff, vs. The Charles Nelson Company, a corporation, Defendant." In that action the plaintiff sought recovery of damages in the sum of $22,000.00 for personal injuries suffered aboard the American barkentine "Mary Winkleman" on or about September 5, 1921, through the negligence of the mate of the vessel, in the course of the employment of the plaintiff as a seaman of that

vessel by the defendant corporation, the owner and operator thereof. Prior to the trial of the action, the defendant commenced in the same court a proceeding in admiralty, No. 17,769, entitled "In the Matter of the Petition of The Charles Nelson Company, a corporation, for Limitation of Liability."

In that proceeding the following proceedings were had.

The "Mary Winkleman" was appraised at the sum of $1500.00 and it was found that there was no freight pending at the termination of the voyage on which Curtis was injured; the petitioner, upon filing an admiralty stipulation in the sum of $1500.00, obtained from the Honorable John S. Partridge, District Judge, in November, 1923, an order restraining the prosecution of the action at law mentioned above and of any and all suits against the petitioner in respect of any claim or claims arising in connection with the voyage on which Curtis was injured, otherwise than in the proceeding for limitation of liability, and ordering the issuance of a monition citing all persons having such claims to make proof of them before a commissioner. Curtis, appearing therein specially for that purpose, moved the District Court for an order vacating the stay, directed by the restraining order and monition, against the prosecution of his action; the motion was argued on behalf of Curtis and of the petitioner before Judge Partridge, and was granted on January 3, 1924, Judge Partridge filing an opinion in support of his decision.

In re The Charles Nelson Co., 294 Fed. ~~939~~ 926 (*The Mary Winkleman*, 1924 A. M. C. 118).

The petitioner appealed to the United States Circuit Court of Appeals for the Ninth Circuit from the order vacating the stay. The trial of the action at law has not been held. The action at law and the proceedings in the District Court for limitation of liability have been in abeyance since the appeal was taken. On October 27, 1924, the Circuit Court of Appeals for the Ninth Circuit rendered a decision reversing the order of the District Court vacating the stay of the action at law.

The Charles Nelson Company v. Curtis (not yet reported).

Two of the counsel filing this brief are attorneys for Curtis, plaintiff in the action at law, and one of them represents him in the limitation proceedings instituted by The Charles Nelson Company.

It is the position of *amici curiae* that the court's answer to question No. 1 should be "No" and its answer to question No. 2 should be:

> "Yes, so far as claims or suits based on personal injuries or death of seamen were subject to the limited liability statutes immediately before the enactment of the Merchant Marine Act of 1920; but claims or suits based on injuries or death of seamen subject to the Employers' Liability Act of April 22, 1908, C. 149, 35 Stat. 65, and its amendments were by that act excluded from the operation of the limited liability statutes; and suits in admiralty based on the Act of March 30, 1920, relating to the maintenance of actions for damages for death caused by wrongful act, neglect, or default occurring on the high seas and certain other navigable waters, C. 95, 41 Stat. 525, were by the last-mentioned act excluded from the operation of the limited liability statutes; that Section 33

creates rights of action and remedies for damages for injuries and death of seamen not covered by the Employers' Liability Act or the said act relating to the maintenance of actions for death, and excludes the operation of limited liability statutes not by a repealing effect, but by creating these rights and remedies to be independent of them; that immediately prior to the adoption of Section 33 the limited liability statutes applied, as to injuries to, or the death of seamen, only to that class of claims and suits which arose from failure to furnish or negligence in furnishing maintenance and cure, or arose from unseaworthiness or a failure to supply and keep in order the proper appliances appurtenant to the ship; that in connection with the last class of suits or claims, but in connection with no others, can Section 33 have a repealing effect and that as to that class Section 33 repeals the application of the limited liability statutes."

A negative answer to the question: Can the liability of the employers of seamen, enforcible under Section 33 of the Merchant Marine Act of 1920, be limited?" furnishes the complete answer to the two certified questions. It is on the principle that such an answer must be given, that the brief prepared in view of the two certified questions and filed in the Circuit Court of Appeals for the Ninth Circuit on behalf of the appellee in the appeal entitled "The Charles Nelson Company (a corporation), Appellant (Petitioner), vs. Thomas S. Curtis, Appellee", No. 4180, is next incorporated herein, with additions.